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Supreme Court of the United States

October Term, 1978

No. 78-78-167

AMERICAN AIR FILTER COMPANY, INC., *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, American Air Filter Company, Inc., *et al.*, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 10, 1978.[1] That judgment affirms the enforcement by the United States District Court for the District of Columbia of orders to file special reports issued by the Federal Trade Commission in connection with two statistical reporting programs.

1. For the Court's convenience, a list of the companies joining in this petition is set forth in Addendum A, *infra*.

Opinions Below

The opinion of the Court of Appeals is not yet officially reported and is set forth in the separately bound Appendix hereto (App. 1-53).[2] The three opinions of the District Court are reported at 432 F. Supp. 274 and 291, and at 1977-2 Trade Cas. ¶72,141 and are also set forth in the Appendix (App. 54-78, 80-118, 121-148).

Jurisdiction

The judgment of the Court of Appeals was entered on July 10, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Whether Section 9 of the Census Act as amended to overrule this Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), permits a federal agency to compel corporations to answer Census Bureau statistical questions for the purpose of obtaining the same specially compiled information as such corporations submitted to the Census Bureau?

2. Whether a federal agency's decision to undertake a broad-based data collection and publication program, unrelated to any law enforcement or other regulatory proceeding, is subject to the rulemaking procedural requirements

2. The opinion of the Court of Appeals was *per curiam*. The panel was composed of Circuit Judges Bazelon and Spotswood Robinson and District Judge Aubrey Robinson.

of the Administrative Procedure Act, 5 U.S.C. §553, when, according to the agency, the program is designed to achieve important policy goals affecting the structure of the national economy?

3. Whether the Fourth Amendment permits judicial enforcement of agency compulsory process without any evaluation of whether the relevance of the information justifies the burden of compliance imposed on the respondent?

Constitutional and Statutory Provisions Involved

The following constitutional and statutory provisions, set forth in full in Addendum B, *infra*, are involved in the questions presented by this petition: The Fourth Amendment to the United States Constitution; 13 U.S.C. §9 (Census Act); 5 U.S.C. §§551(4), 553 (Administrative Procedure Act); 15 U.S.C. §46(b) (Federal Trade Commission Act).

Statement

This case concerns two separate statistical reporting and publication programs that the Federal Trade Commission has lately undertaken. One is the corporate patterns or CPR program, and the other is the annual line of business or LB program Neither program is being conducted to support any specific law enforcement or regulatory activity of the FTC. In each case the corporations required to submit information are selected on the basis of objective statistical criteria and not on the basis of any suspected wrongdoing. The corporate patterns pro-

gram calls for the submission by 1,000 large corporations of information developed specially for the Census Bureau's once-every-five years *Census of Manufactures* on the value of goods shipped by them, classified according to Census Bureau codes. The Commission intends to publish these Census statistics in individual company form and also to use them internally as an economic "data base."[3] The program is strenuously opposed by the Census Bureau and other government agencies because of the clear threat it poses to the national Census system, which is predicated on the confidentiality of individual Census returns. 13 U.S.C. §9.

In the case of the annual line of business program, the Commission intends to publish aggregate statistics concerning the relative profitability of the nation's manufacturing markets, for the stated purpose of influencing investment choices and thus directing how national economic resources are allocated. The Commission is requiring that 450 of the nation's largest manufacturing companies spend millions of dollars annually to recast their financial performance data and report them according to "line of business" categories that have been constructed by the FTC and that are supposed to equate with markets. The Commission on Federal Paperwork and the General Accounting Office, however, have found serious flaws in the FTC's construction of "lines of business," and the GAO has concluded that data aggregated in such classifications would be "unreliable at best, and may be seriously misleading."[4]

3. CPRA. 257. The record references herein to "CPRA." and "LBA." are to pages of the joint appendices filed with the Court of Appeals in the corporate patterns and line of business cases respectively.

4. LBA. 415.

The Corporate Patterns Report Program

Every five years the Census Bureau conducts the well-known *Census of Manufactures,* which provides a wealth of information concerning American industry, unavailable anywhere else and vital to governmental and private planners and policymakers and to scholars. This census is conducted pursuant to specific statutory direction. 13 U.S.C. §131. Information for the *Census of Manufactures* (and other censuses) is submitted under the strictest statutory guarantee that each individual corporation's contribution to the aggregate statistics will be kept confidential. 13 U.S.C. §9. The statutory guarantee is reinforced by a Presidential Proclamation of 1929, 46 Stat. 3011, 3012, which in encouraging cooperation with the government's census-takers states that "[t]here need be no fear that any disclosure will be made regarding any individual person or his affairs." As a result of these guarantees, there is a long-standing tradition of cooperation by corporations with the Census Bureau, justifying the reliance necessarily placed on the completeness and accuracy of Census data in the preparation of the great national economic accounts, *i.e.,* the gross national product and others, and in their use in the making of the most important economic policy decisions.[5]

Included in the information that corporations develop especially for and report solely to the Census Bureau as a part of the *Census of Manufactures,* as well as the

5. See affidavits of the current and a former director of the Census Bureau, sworn to on November 1, 1977 and July 13, 1976, respectively, and reprinted in Addendum C, *infra.*

Annual Survey of Manufactures, is information concerning "value of shipments." This is a term of art meaning, roughly, the invoice value of goods shipped from each of a company's plants less freight charges, excise taxes, discounts and allowances or, in the case of goods shipped from one plant to another plant of the same company, the value of the goods as measured by their cost. Goods are classified according to five-digit Census Bureau "product class" codes. These codes were specially developed by Census for its surveys because the two-, three- and four-digit codes included in the Standard Industrial Classification Manual published by the Office of Management and Budget are not precise enough for Census purposes.[6]

The Federal Trade Commission has for many years attempted to obtain these specially compiled Census statistics. Barred by Section 9 from obtaining them directly from the Census Bureau, the FTC has tried to subpoena or otherwise compel production of the Census schedules retained by respondent corporations.[7] It was such an effort that led to this Court's decision in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961), that retained Census reports were not protected against FTC process. The following year Congress amended Section 9 to specify that no agency of the government "shall require, for any reason," the production of retained copies of Census reports and that such copies "shall be immune from legal process. . . ." 76 Stat. 922.

6. *See* U.S. Bureau of the Census, Census of Manufactures: 1972 Numerical List of Manufactured Products (New (1972) SIC Basis), Series MC72-1.2.

7. *See* FTC v. Orton, 175 F. Supp. 77, *rehearing denied,* 177 F. Supp. 241 (S.D.N.Y. 1959) (prohibiting forced disclosure to FTC of retained Census schedules); FTC v. Dilger, 276 F.2d 739 (7th Cir.), *cert. denied,* 364 U.S. 882 (1960) (same).

The FTC nevertheless decided 12 years later to make the specialized value of shipments data reported to the Census Bureau the core of a broad-scale information gathering and publication program that it called the corporate patterns program. That program was undertaken by the Commission when on December 17, 1974, it authorized compulsory process to obtain from the 1,000 largest domestic manufacturing companies value of shipments information for 1972, the year of the latest *Census of Manufactures,* which the Commission would use for its internal enforcement and regulatory purposes and for ultimate publication to the general public.[8] The FTC's report form tracked the Census questionnaire word for word in defining value of shipments and tracked it also in the use of Census Bureau five-digit product class codes.

The FTC resolution authorizing the program was adopted without any prior opportunity for public participation. On January 22, 1975, the FTC asked the General Accounting Office for clearance under the Federal Reports Act, 44 U.S.C. §3512. At that time the FTC stated that it intended the corporate patterns program to be a continuing one in which the data would be collected "every five years to coincide with the quinquennial *Census of Manufactures.*"[9] It also made known its plan to publish the value of shipments data in a form identifiable by individual company.[10]

When the plans of the Commission were thus disclosed, other government agencies weighed in with strenuous ob-

8. CPRA. 254, 261.

9. CPRA. 259.

10. CPRA. 253.

jections. The Census Bureau and its sister Commerce Department agency, the Bureau of Economic Analysis, protested that the FTC program would have a serious adverse impact on the quality of Census data.[11] (The Bureau of Economic Analysis is critically dependent on Census data, using them for its calculation of the gross national product and the other national economic accounts.[12]) The Secretary of Commerce himself objected that the Commission was proposing to "circumvent the provisions of Title 13, United States Code, regarding confidentiality of individual firm data."[13] The Office of Management and Budget seconded these objections in strong terms.[14]

The GAO itself finally said that, although "it is evident that the information you are seeking duplicates data already collected by the Bureau of the Census," it did not construe the Federal Reports Act as authorizing it to deny a clearance.[15] Thereafter, without affording any opportunity for a public expression of views, the FTC served identical orders on more than 1,000 corporations in September 1975 requiring each of them to complete and file a corporate patterns report that would set forth its value of shipments data. Motions to quash were filed with the Commission by 390 of the companies and denied in December 1975.[16]

In its denial statement, the Commission acknowledged that "many of the items of data called for will have been developed and known to the companies in connection with their completion of census reports," but it asserted that the corporate patterns program did not violate the Census Act because it did not explicitly "require that copies of the Census returns be produced."[17] However, while purporting not to "require" the actual copies of Census reports, the Commission took pains to point out to respondents that the information sought by the Commission was readily available to them on their carbon or photocopy of the Census reports, and it invited the respondents simply to copy the numbers from their file copies onto their CPR forms.[18] This invitation was reiterated by the Commission in a follow-up letter to each CPR respondent, again suggesting that the respondent copy the numbers on the file copies of its Census form onto the FTC's CPR form and furnishing explicit instructions for doing this.[19]

11. CPRA. 274, 270.

12. See affidavits of Census Bureau directors, Addendum C, *infra*, pp. C1-C4, C5-C13.

13. CPRA. 452.

14. OMB stated:

> It is our view and that of the Commerce agencies that Congress spoke most definitely on the subject of disclosing such data when it passed and later amended the Census law (title 13, United States Code, section 9), in which such disclosure of responses in identifiable form and subpoena of company file copies of Census reports is forbidden. The present situation is not unlike that in 1961 in which the FTC subpoenaed the copy of a Census report retained in the files of the St. Regis Paper Company. The congressional reaction in that instance was both swift and unambiguous; in 1962 they amended the Census law to provide immunity from legal process for the retained file copies of their reports. The CPR, to be conducted on a mandatory basis, is tantamount to the same thing and will be viewed by the respondent as a subterfuge to obtain Census data. [CPRA. 290-91.]

15. CPRA. 777.

16. CPRA. 455.

17. CPRA. 464, 477.

18. CPRA. 467 n. 12.

19. CPRA. 335.

The Annual Line of Business Program

The annual line of business program was promoted at the time of its inception as nothing less than a vehicle by which to achieve a reallocation of national economic resources and a restructuring of American industry.[20]

Under the program, the Commission plans to obtain profit-and-loss and balance-sheet data from a substantial number of the nation's largest and most diversified manufacturing companies, about 450 of them, broken down by lines of business. The survey is to be repeated annually, resulting in the publication of line of business statistical reports every year.

The FTC has established 260 line of business categories for purposes of the program. Because manufacturing corporations are not organized in the way the FTC's line of business categories assume, the Commission's reporting rules include detailed instructions for recasting the financial data they prepare in the ordinary course of business so that the numbers can be assigned to FTC line of business categories. The uniformity that it is hoped thus to achieve is, in the Commission's view, essential to the usefulness of aggregate line of business statistics. As the Court of Appeals said, "the key feature of the survey is its requirement that each company present its financial performance statistics in terms of a uniform set of market categories." (App. 9.)

20. LBA. 308, 435, 715.

After the line of business data submitted by individual companies are aggregated into category totals by FTC staff, the aggregate figures are to be published and will purportedly reveal, *inter alia,* sales, costs, assets, and profits for the nation's manufacturing markets. These aggregate statistics are then to be used by investors, competitors, and other groups in the private sector as a basis for allocating capital resources, and the Commission itself plans to use these data to determine what national markets should be subjected to industry-wide antitrust investigations. (App. 10.) The unaggregated individual company data received by the FTC are supposed to be sequestered from use in connection with any FTC law enforcement investigation or adjudication.

The kind of "segment" financial reporting that the line of business program involves had its genesis in 1970 when the Securities and Exchange Commission amended its reporting regulations, after a rulemaking proceeding comporting with 5 U.S.C. §553, to require limited segment financial data to be included in 10-K reports filed annually by corporations with the SEC. The FTC initiated its own program in 1973 after it was unable to persuade the SEC to require that segment data be reported on the basis of a uniform system of line of business categories.[21]

21. LBA. 331-32, 2014. The authoritative Financial Accounting Standards Board has recently issued a new accounting standard requiring corporations, commencing with fiscal year 1977, to report financial data for their business segments in public financial statements such as annual reports to shareholders. LBA. 1948. But like the SEC, the FASB determined that it would be inappropriate to impose a uniform category system; instead, corporations are required to define lines of business in a manner consistent with how they are actually organized to do business.

It is the view of numerous experts in the fields of accounting and economics that the Commission's line of business program is seriously flawed in concept and design.[22] Moreover, the General Accounting Office, after evaluating the program pursuant to the Federal Reports Act, 44 U.S.C. §3512, found that the aggregated LB data will be "unreliable at best, and may be seriously misleading" and expressed reservations "as to whether any meaningful hypotheses could be tested by the data developed by the line-of-business program."[23] After conducting its own review in 1977, the Commission on Federal Paperwork echoed these findings in calling for "a complete reexamination" of the program.[24]

A principal criticism is that virtually each one of the 260 purported "market categories," into which companies must recast their data, encompasses numerous heterogeneous products. For example, a typical FTC category includes, *inter alia,* "ammonia applicators," "farm tractors" and "windmills." Another includes "manhole covers" and "window sills." Such categories on their face are not "markets." *See Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962). Further, these data will exclude statistics from major segments of every "line of business," namely, all medium and small firms and all foreign imports.[25] Hence, forcing domestic companies at

22. LBA. 633, 652, 680, 500, 506, 507, 1435.

23. LBA. 415, 801.

24. A Report of the Commission on Federal Paperwork: Segmented Financial Reporting 3 (June 10, 1977). LBA. 1704.

25. LBA. 864. In many U.S. industries, *e.g.,* steel, automobiles and electronics, imports are a major element of competition and market structure.

great expense to recast their financial data to fit such defective classifications will accomplish little but burden. The program will result in the public dissemination of data falsely portrayed as market facts. But, once these unreliable data are aggregated and published for use inside and outside government, there will be no opportunity —as there would be in the ordinary case of, for example, data subpoenaed in connection with an enforcement proceeding—for an affected company to disprove their worth in an evidentiary setting.

The program's fundamental defects reflect the fact that the Commission has refused, over repeated objections since 1973, to follow the informal rulemaking provisions of the Administrative Procedure Act (5 U.S.C. §553). The FTC made its final decision to adopt and pursue the line of business program on March 26, 1974. On the same date it said that, if requested, it would hold hearings the following year "[w]ith the understanding that the Commission would be receptive only to improving the quality of the data received and that the basic concept of LOB reporting [would] not [be] open to question . . . ."[26]

On August 2, 1974, after receiving from the GAO a highly qualified and limited clearance of the initial line of business report form under the Federal Reports Act, the Commission issued orders to approximately 350 corporations requiring them to complete the form for the 1973 reporting year. More than 200 corporations moved to quash these orders. These motions were denied by the Commission in January 1975.

26. LBA. 990. These limited hearings were held in May, 1975.

In the course of early litigation over the program, the United States District Court for the District of Delaware ruled that there appeared to be merit to the claim that the program was invalid for failure to follow prescribed rulemaking procedures. *A. O. Smith Corp.* v. *FTC,* 396 F. Supp. 1108, 1125 (D. Del. 1975), *rev'd on other grounds,* 530 F.2d 515 (3d Cir. 1976). The Commission thereafter, in April 1975, invited comments on proposed technical revisions to the report form and accompanying instructions for subsequent reporting years. Again, however, it made clear that it was not interested in comments on whether there should be any line of business program at all or whether the Commission's basic approach was sound. In August, 1975, after adopting with slight modifications the revisions it had proposed and after obtaining GAO clearance of the revised report form, the Commission issued its second cycle of line of business orders to some 450 corporations requiring them to file reports for their 1974 fiscal years. After rejecting motions to quash these 1974 orders, the Commission withdrew its then still pending 1973 orders. It has since issued additional orders for the 1975 and 1976 reporting years, which are outstanding.

The Litigation

The corporate patterns and line of business programs are distinct and have been litigated in separate sets of consolidated proceedings. There have been a number of different actions in several different courts. Eventually, all cases involving each of the two programs were effectively consolidated in the District Court for the District of Columbia. (App. 7 n.1.) The cases include both preenforcement review actions instituted by corporations subject to the programs and FTC actions to enforce its compulsory process.

In its single opinion affirming the District Court's judgments enforcing both the corporate patterns and line of business orders, the Court of Appeals, among other things, rejected the argument of these petitioners that the FTC's demand for value of shipments data developed specially for the *Census of Manufactures* and provided to the Census Bureau violated the confidentiality guarantee of the amended Section 9 of the Census Act. The court professed first to read the statute literally as encompassing only the piece of paper in a company's files that is the duplicate copy of what was submitted to Census. (App. 25.) But then it went beyond the literal terms of the statute to draw a distinction between asking the same question as Census, which the FTC concededly did here and which, in the court's view, an agency may do, and demanding the same answer, which the court said may not be done but which the FTC claimed not to have done. Although the FTC was asking respondents to answer a question "essentially identical" to the question posed by the Census Bureau and was seeking and expecting to get the same answers previously given to the Census Bureau, the court ruled that the FTC had not violated the Census Act because it had not literally demanded that the answers given to the FTC be precisely identical. (App. 30-31.)

The court also rejected petitioners' claim that before it adopted either program the FTC was required to follow the rulemaking procedures prescribed by 5 U.S.C. §553.

The court held that neither program was a "rule" within the meaning of the Administrative Procedure Act and that information gathering is an agency activity that is necessarily separate from rulemaking and adjudication. (App. 17-21, 18 n.48.) Finally, in upholding the District Court's enforcement of the line of business orders as routine compulsory process, the court expressly endorsed the District Court's refusal to undertake any evaluation of whether the relevance of the data to be collected by the line of business orders to the Commission's purposes justified the concededly substantial burden of compliance. (App. 35-38.)

The reporting requirements were stayed pending the Court of Appeals' decision. In the case of the corporate patterns program, after the District Court and the Court of Appeals denied a stay pending appeal, such a stay was granted by Mr. Justice Brennan.[27] In the case of the line of business program, the FTC itself repeatedly extended the compliance deadline until the Court of Appeals finally entered a formal stay order.

Reasons for Granting the Writ

I. The Census Act Question

The amended Section 9 of the Census Act provides: "No . . . agency . . . of the Government [except the Census Bureau itself] . . . shall require, for any reason, copies of census reports which have been retained by [any particular] establishment or individual," and provides further: "Copies of census reports which have been so retained shall be immune from legal process. . . ." 13 U.S.C. §9. The

27. Order, Nos. A-370 and A-389 (Nov. 7, 1977).

question whether, despite this clear guarantee of confidentiality of retained Census data, another federal agency may require the production of data specially developed for and submitted to the Census Bureau is an important question of federal law that has not been and should be decided by this Court.

The decision of the court below was that, when the FTC does not in terms seek from a corporation the file copy of its *Census of Manufactures* submission to the Census Bureau but asks for substantially what is recorded thereon, the FTC may obtain the information that the file copy would disclose. That is a crabbed reading of Section 9 that gives no effect to the policy that lay behind its amendment in 1962.

The amendment was of course prompted by this Court's decision in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1962). There a majority of the Court had held that the unamended Section 9, which did not include the language quoted above concerning copies but which guaranteed confidentiality of Census submissions and their containment within the Census Bureau, did not preclude the FTC from subpoenaing a file copy of a corporation's value of shipments submission.

Congress acted within less than a year to correct what it obviously considered a mistakenly narrow construction of its confidentiality guarantee, a construction that could have deleterious effects on the vital accuracy and completeness of Census data. In amending Section 9, Congress placed heavy reliance on the dissenting opinion of Mr. Justice Black in the *St. Regis* case. S. Rep. No. 2218, 87th

Cong., 2d Sess. 2 (1962); H. R. Rep. No. 2437, 87th Cong., 2d Sess. 2 (1962). Joined by Mr. Justice Whittaker and Mr. Justice Stewart, Mr. Justice Black had said:

> Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government. [368 U.S. at 229.]

It was the dissent's generous view of the government's promise that Congress sought to restore in amending Section 9 to protect specifically file copies retained by Census respondents. S. Rep. No. 2218, *supra*, at 2; H.R. Rep. No. 2437, *supra*, at 2.

The Court of Appeals' decision runs squarely counter to this Congressional purpose. The court initially seemed willing to base its decision on the literal language of Section 9 without more, taking substantially the same tack as the majority of this Court had in the *St. Regis* case. It said that the language of the amended provision "unambiguously protects actual file copies of census reports retained by corporations" and that a construction of the statute that would encompass the Census-defined and specially compiled value of shipments data sought by the FTC "extends so far beyond the statute's plain terms that we might fairly reject it without further inquiry." (App. 25.)

But the court did undertake further inquiry and made clear in the course of it that the literal language of the statute as the court read it did not by any means answer

all questions that might arise under it. The court acknowledged that, even though no "actual file cop[y]" was sought, an agency could not ask of a Census respondent the same question that had been put to it by Census if the question demanded an answer identical to that furnished to Census. (App. 28-30.) The court believed that, though the FTC was putting an identical question,[28] an identical answer was not required, apparently because with the passage of time since the Census data were submitted more complete or accurate information might be available. (App. 29-31.)

We submit that, if the fact that data prepared specially for confidential submission to the Census may be subject to correction is enough to allow another agency to obtain such data, then the amended Section 9 is no barrier at all, let alone the guarantee it was meant to be that the government's promise of confidentiality would be faithfully kept, without "picayunish haggling."

Of course, underlying business records do not become immune from governmental process when they are used to prepare a Census report. The responsible Congressional committees acted to ensure against that unwarranted result by deleting from the 1962 legislation language that in its breadth might have had that effect. H. R. Rep. No. 2437,

28. The FTC's question differed only in that (1) it required that the plant-by-plant data given to Census be summed to company-wide totals and (2) the FTC asked that shipments be classified according to the five-digit codes adopted by the Census Bureau in 1972 whereas the desired Census responses for most companies were in terms of previous 1967 Census codes. This presented no real difference, however, since the Census Bureau had itself converted the responses of the companies to the new codes and had set these numbers forth on the Census forms it sent to them in 1973. (App. 23.) It was these converted numbers appearing on the 1973 Census form that the FTC specifically invited respondents to sum into corporate totals and copy onto their corporate patterns questionnaires. (CPRA. 335.)

supra, at 1-2. But it is clear at the same time that, more than just a piece of paper on which information is written, the "information furnished" to the Census Bureau, in the specialized form furnished, was intended to be immune. *Id.* at 2-3. The FTC has effectively acknowledged that it was just this Census-defined information that it sought when it wrote to respondents to remind them that they could copy the data off of their copies of Census reports in responding to the FTC's CPR questionnaire (pp. 9 & n.28, *supra*).

The question posed by the Court of Appeals' decision is important not only doctrinally, as a test of whether a correction of what Congress perceived as a judicial error in the construction of a statute is to be received grudgingly or hospitably, but also practically. The record, which includes the affidavits of two successive directors of the Bureau of the Census (Addendum C, *infra*), demonstrates that the Court of Appeals' decision, if allowed to stand, will cause companies to reconsider their willing cooperation with Census. The result is likely to be a serious deterioration in the quality of data that Census collects under both its mandatory and voluntary programs, and any such deterioration will impair the ability of the government to deal rationally with basic economic problems confronting the nation.

The Secretary of Commerce has said in a letter on file here, in connection with the stay application (p. 16, *supra*), that this litigation raises "very important issues of public policy."[29] If the decision of the court below is left standing, its narrow construction of the *St. Regis* amendment

29. No. A-370, letter of Hon. Juanita M. Kreps (Nov. 2, 1977).

would mean that Congress accomplished nothing of substance in amending the Census Act. The issue of confidentiality of Census material merits this Court's plenary consideration.

II. The Administrative Procedure Act Question

Good, bad or indifferent, the corporate patterns and line of business programs are important, innovative programs of the Federal Trade Commission. In fact, the Chairman of the FTC has described the line of business program as the Commission's "most important single economic activity."[30] Both programs are free-standing information-gathering and publication undertakings, unrelated to any adjudicatory or other regulatory proceedings.

There are serious questions as to the worth of both programs, the soundness of the bases on which the Commission proposed to proceed and the way it plans to proceed. We have just noted the expressed concerns of other agencies as to the very gathering of Census data in the corporate patterns program. We have also noted the concerns of experts and of the GAO and the Paperwork Commission that the line of business program is seriously flawed conceptually and in its design. There is the most serious question whether the resulting data will be worth the substantial costs required to generate them and, indeed, whether the program is not likely to do more harm than good.

The FTC did not by a notice of proposed rulemaking throw its proposal open to criticism such as this, stating its

30. LBA. 706.

tentative views and inviting the views of others; it established no proceeding in which critical views could be received and explained; it did not force itself to undergo the discipline, so supremely conducive to rational decision-making, of dealing with the criticisms and explaining the basis and purpose of the program it adopted. The question whether these informal rulemaking procedures of 5 U.S.C. §553 should have been invoked before the Commission proceeded with either of the programs is an important one. This Court in recent decisions has laid heavy emphasis on Section 553 as the sum of Congress' prescription of procedural requirements in rulemaking. *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* Nos. 76-419 and 76-528, decided April 3, 1978; *United States* v. *Florida East Coast Ry.,* 410 U.S. 224 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972). A corrollary of the Court's insistence in the cited cases that courts may not impose on agencies more exacting procedural requirements than are set forth in the APA is surely that courts must insist that the minimal APA procedures be followed in all those cases to which Section 553 applies.

We believe that, contrary to the judgment below, each of the programs in issue is a rule within the APA definition of that term, 5 U.S.C. §551(4), and that therefore Section 553 does apply. Section 551(4) defines a rule as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency

and as including:

> the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

"Rule making" is defined as "agency process for formulating, amending, or repealing a rule." 5 U.S.C. §551(5). Section 553 governs (with some exceptions not pertinent here) "rule making" as so defined.

The Commission has denied the applicability of Section 553 to any exercise of its power under Section 6 of the Federal Trade Commission Act to investigate and gather information. The court below agreed. The court first found that nothing in Section 6 itself required the observance of APA rulemaking procedures. (App. 15-17.) This is not surprising in a statute that dates from 1914; the statutory provision enacted in 1946 as Section 4 of the APA (codified as 5 U.S.C. §553) laid new demands on all agencies and brought about the reform of rulemaking procedures throughout government. Then, looking at least to the right place, the court found that what the Commission was doing should be regarded as investigation and not as rulemaking or adjudication under the APA. (App. 17-21.) It quoted a remark of one sponsor of the APA, Rep. Walter, who did indeed seem to divide the compulsory powers of administrative agencies into three categories: legislative (rulemaking), judicial (adjudication) and investigation. (App. 19-20.) But Congressman Walter also said that the power of investigation or compulsory process "may be incidental to either legislative or judicial powers

of administrative agencies, or it may be entirely independent of either." *(Id.)* The Congressman did not mean that, any time information gathering is a part of an agency program, that program is neither legislative (rulemaking) nor judicial (adjudication). If he did, this Court has effectively rejected his view. The dispute over whether rulemaking procedures should have been followed or adjudication was sufficient, which divided the Court in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), concerned an exercise in information gathering, a requirement that an employer furnish a list of names and addresses of its employees.

The Commission itself has described the line of business program as legislative or quasi-legislative in nature.[31] The program is an integrated data collection and dissemination program. It is an attempt by the Commission at "regulation by publicity" or "regulation through public dissemination of the full and complete facts," which were the Commission's own descriptions of a much more limited data collection and publication program as quoted by this Court 50 years ago. *FTC* v. *Claire Furnace Co.*, 274 U.S. 160, 169 (1927). Publication of the data is the *raison d'etre* of the program. Unless the data are published, the Commission cannot hope to achieve its legislative goal of improving industry's competitive performance. That is the stated policy objective of the program, adopted pursuant to the laws that the Commission administers, the Federal Trade Commission Act and the Clayton Act. The

31. LBA. 1502.

program is plainly designed to implement or prescribe law or policy and thus falls within Section 551(4).[32]

The attempt to reduce the program to a process of simple information-gathering or investigation, divorced from the proposed publication of the data with its overall regulatory purpose, is largely the work of Commission counsel in a litigation context. The attempt brings to mind this Court's admonition in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 246 (1972), where it found it impossible to sustain a Commission order (even though it agreed with the Commission on the law) because "[t]he difficulty with the Commission's position is that we must look to its opinion, not to the arguments of its counsel, for the underpinning of its order." *See also Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-69 (1962). There is no single opinion of the Commission in either of these cases—for the very reason that it declined to proceed under a statute that, among other things, would have required it to set forth the bases and purposes of the programs. Its reasons for adopting the programs, however, were expressed in a series of public statements by the Commission or its mem-

32. In what has been said immediately above we have used the line of business program as our textual example, but what is said applies also to the corporate patterns program. There is a particular additional reason why the line of business program fits the APA definition of a rule. That definition covers as a specific instance of a rule the prescription for the future of accounting or practices bearing thereon. The line of business program demands of those companies subject to its requirements novel breakdowns of financial data. The detailed accounting rules prescribed by the Commission for making the breakdowns and ensuring the uniformity of the data reported are foreign to the companies affected. They will have to make significant changes in or additions to their accounting practices to meet their annual obligations under the program. LBA. 1010. The result is, despite the contrary protestations of the Commission and the court below, an effective prescription of accounting or practices bearing thereon.

bers—including the testimony of the Chairman describing the line of business program as the Commission's single most important economic activity. Agency undertakings with purposes as comprehensive and ambitious as those claimed for these programs are a far cry from counsel's equation of the FTC's actions with the simple issuance of compulsory process in an enforcement case.

When the Federal Power Commission proposed to require natural gas companies for the first time to submit detailed information about their natural gas reserves, it apparently recognized that it was implementing or prescribing law or policy, and it published a notice of proposed rulemaking and received written and oral comments before adopting a reporting requirement. On review, the Court of Appeals said that "[p]resumably the Commission felt, properly, we think, that its procedure in this case was governed by the 'Rulemaking' section of [the Administrative Procedure] Act, 5 U.S.C. §553." *Union Oil Co.* v. *FPC*, 542 F.2d 1036, 1039 (9th Cir. 1976). The FTC here had all the more reason in these cases to think that its procedures should have been governed by Section 553.

At the very least, the question presented here is novel as well as important: whether, when an agency sets out to make policy by means of an exercise of agency process unconnected to any ancillary agency proceeding, its action is any the less subject to the procedural requirements of Section 553 than it would be if the agency chose a more orthodox regulatory approach.

III. The Scope of Review Question

If the Court were to decide the second question presented in favor of these petitioners, the Commission would

be required to conduct rulemaking proceedings that could reasonably be expected to result in administrative records suitable for any further judicial review. There were no such defined administrative records in the cases as they were actually heard below. In the absence of a record, there was no effective review. The District Court, sustained in this by the Court of Appeals (App. 31-32), went so far as to hold that the FTC's production orders were not agency action at all within the meaning of the Administrative Procedure Act and thus not even subject to review according to the APA standards set forth in 5 U.S.C. §706. The courts below thus held that there need not be even the minimal inquiry as to the rationality and basis for the programs that is commanded by Section 706(2)(A), with its requirement that a reviewing court set aside agency action "found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." *See Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

More than that—and this is the basis of the third important question petitioners present, pertaining to the line of business orders—the courts below did not subject the FTC's orders even to the minimal scrutiny that the Fourth Amendment requires when judicial enforcement of any agency subpoena or other process is requested.

Apart from anything else, review by this Court of that ruling is essential because it will otherwise stand as authority for the exercise of a general warrant power by the FTC —a power that the Fourth Amendment places beyond the pale of permissible Congressional delegation. *Marshall* v. *Barlow's, Inc.*, No. 76-1143, decided May 23, 1978; *FTC* v. *American Tobacco Co.*, 264 U.S. 298 (1924).

In an unbroken line of cases, this Court has emphasized that the issues of the relevance and burdensomeness of agency process, and the role of the judiciary in determining those issues, are "neither minor nor ministerial." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 217 n.57 (1946).[33] Resolution of the issues requires, among other things, a careful evaluation of how relevant the information demanded is to the purposes articulated by the agency in support of its incursion into private business records compared with the burden that the incursion places on the business proprietors. No such balancing took place with respect to the line of business program, despite the open acknowledgment by the lower courts that (a) the burden of compliance would run into hundreds of thousands of dollars annually for some respondents (App. 138-39), and (b) the information that would be produced may or may not be useful in effectuating the kind of educational regulatory endeavor which the line of business program represents (App. 19 n. 48, 36 n.102, 130).[34]

The Court of Appeals tersely stated that "appellants have failed to persuade us that the District Court erred in its refusal to disregard the long and consistent line of

33. *See also* See v. City of Seattle, 387 U.S. 511 (1967); United States v. Morton Salt Co., 338 U.S. 632 (1950); FTC v. Claire Furnace Co., 274 U.S. 160 (1927); FTC v. American Tobacco Co., 264 U.S. 298 (1924); Hale v. Henkel, 201 U.S. 43 (1905).

34. The most that the District Court was able to conclude was that the information to be produced would not be "totally useless." (App. 130.) It was only on the basis of applying this far too lenient standard that the District Court determined not to take and hear evidence on the issue of relevance and to grant summary judgment for the Commission. (*Id.*) The Court of Appeals, while purporting to apply the higher standard of "reasonable relevance," ignored the fact that in so doing it revitalized a hotly disputed issue of fact precluding judgment under Rule 56. (App. 36.)

authority supporting independent consideration of relevance and burdensomeness." (App. 37-38.) Yet, this Court in *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967), stated very clearly the "settled" rule that the court below refused to follow:

> It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, *relevant in purpose*, and specific in directive *so that compliance will not be unreasonably burdensome.* [Emphasis supplied.][35]

It is only by measuring the burden of a demand for private business information against the relevance of that information to the agency's purpose that a court can evaluate the "reasonableness" of the agency's process in a meaningful way, as required by the Fourth Amendment. Otherwise, demands costing business enterprises (and, ultimately, consumers) millions of dollars but yielding data of at best marginal relevance could be routinely enforced, and in the words of the dissenting members of the *en banc* panel of the Court of Appeals in *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 905 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977), "the Federal Trade Commission—or any other of our regulatory agencies—would speedily metamorpho-

35. *See also* Hale v. Henkel, *supra*, 201 U.S. at 76-77; FTC v. Baltimore Grain Co., 284 F. 886, 889-90 (D. Md. 1922), *aff'd per curiam*, 267 U.S. 587 (1925). The only decisions of this Court cited by the court below as purportedly establishing a contrary "long and consistent line of authority" were United States v. Morton Salt Co., *supra*, and Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). A reading of these cases, however, shows clearly that they do not support the Court of Appeals' statement that the issues of burden and relevance are unrelated and must be determined separately.

size into the 'Roving Commission.'" This Court should act to ensure that agency process is subjected to the meaningful judicial scrutiny required by the Fourth Amendment.

Conclusion

The petition should be granted.

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ADDENDA

ADDENDUM A

List of Petitioners

A. E. Staley Manufacturing Co.
Air Products and Chemicals, Incorporated
Allegheny Ludlum Industries, Inc.
Aluminum Company of America
Ambac Industries, Incorporated
American Air Filter Company, Inc.
American Can Company
American Cyanamid Company
American Greetings Corporation
American Home Products Corporation
American Maize-Products Company
American Stores Company
Anchor Hocking Corporation
Anheuser-Busch, Inc.
A. O. Smith Corporation
Archer-Daniels-Midland Co.
Armco Steel Corporation
Armstrong Cork Company
Asarco Incorporated
Ashland Oil, Inc.
Atlantic Richfield Company
The Babcock & Wilcox Company
E. T. Barwick Industries, Inc.
The Bendix Corporation
Bethlehem Steel Corporation
The Black and Decker Manufacturing Company
The Boeing Company
Bristol-Myers Company
Brockway Glass Company, Inc.
Brown Group, Inc.
Campbell Soup Company
Carnation Company
Carpenter Technology Corporation

Addendum A

The Carrier Corporation
Caterpillar Tractor Co.
The Ceco Corporation
Celanese Corporation
Champion Home Builders Company
Chemetron Corporation
Chrysler Corporation
Cincinnati Milacron, Inc.
C.I.T. Financial Corporation
Cities Service Company
City Investing Company
The Coca-Cola Company
Cone Mills Corporation
Congoleum Corporation
Consolidated Foods Corp.
Continental Group, Inc.
Cooper Industries, Inc.
CPC International, Inc.
Crane Company
Dairylea Cooperative, Inc.
Dean Foods Company
Del Monte Corporation
Diamond International Corporation
Diamond Shamrock Corporation
Digital Equipment Corporation
Dover Corporation
The Dow Chemical Company
E. I. du Pont de Nemours and Company
Eagle-Picher Industries, Inc.
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Emery Industries, Inc.
Exxon Corporation
Faberge, Incorporated

Addendum A

Fairmont Foods Company
Fedders Corporation
The Firestone Tire & Rubber Company
FMC Corp.
Food Fair Stores, Inc.
Ford Motor Company
Fuqua Industries, Inc.
GAF Corporation
General Electric Company
General Mills, Inc.
General Motors Corporation
General Telephone & Electronics Corp.
The General Tire & Rubber Co.
Gerber Products Company
The B. F. Goodrich Company
Gulf & Western Industries, Inc.
Gulf Oil Corporation
Hallmark Cards, Incorporated
Handy & Harman
Harnischfeger Corporation
Harris Corporation
H. J. Heinz Company
Hershey Foods Corporation
Heublein, Inc.
Hoffmann-La Roche Inc.
Honeywell Inc.
Household Finance Corp.
Howmet Corporation
Hudson Pulp & Paper Corp.
Hughes Tool Company
ICI Americas, Inc.
Ingersoll-Rand Company
Inland Container Corporation
Inland Steel Company
International Business Machines Corporation

Addendum A

International Harvester Company
International Paper Company
Jim Walter Corporation
Johns-Manville Corporation
Johnson & Johnson
Kaiser Aluminum & Chemical Corporation
Kane Miller Corporation
Kellogg Company
Kellwood Company
Kimberly-Clark Corporation
Kirsch Company
Kohler Co.
Koppers Company, Inc.
Kraft, Inc.
Lear Siegler, Inc.
Lehigh Portland Cement Company
Leviton Manufacturing Company, Incorporated
Litton Industries, Inc.
Loews Corporation
Lone Star Industries, Inc.
The Marley Company
Martin Marietta Corp.
Mattel, Inc.
McGraw-Edison Co.
Mead Corporation
Miles Laboratories, Inc.
Mine Safety Appliances Company
Minnesota Mining & Manufacturing Company
Monsanto Company
Motorola, Inc.
The Murray Ohio Manufacturing Co.
Nabisco, Inc.
National Can Corporation
National Gypsum Company
NL Industries Incorporated

Addendum A

Northwest Industries, Inc.
Norton Simon, Inc.
Occidental Petroleum Corporation
The Ohio Brass Company
Olin Corp.
Oscar Mayer & Co., Inc.
Outboard Marine Corporation
Overhead Door Corporation
Owens-Illinois, Inc.
Oxford Industries, Inc.
Paccar Inc.
Pepsico, Inc.
Phillips Petroleum Company
Pittsburgh Forgings Company
Polaroid Corporation
PPG Industries, Inc.
The Procter & Gamble Company
Raytheon Company
Reliance Electric Company
Republic Steel Corporation
Revlon, Inc.
Rexnord, Inc.
R. J. Reynolds Industries, Inc.
Reynolds Metals Company
Rhinechem Corporation
Rockwell International Corp.
Rorer-Amchem, Incorporated
Rubbermaid Incorporated
Safeway Stores, Incorporated
SCM Corporation
The Scott & Fetzer Company
Scott Paper Company
Shell Oil Company
The Sherwin-Williams Company
Simplicity Pattern Co., Inc.

Addendum A

Simpson Timber Company
The Sperry and Hutchinson Company
Sperry Rand Corporation
Standard Brands Incorporated
Standard Oil Company of California
Standard Oil Company (Indiana)
Standard Pressed Steel Co.
Sterling Drug, Inc.
Sunbeam Corporation
Sundstrand Corporation
The Tappan Company
Texas Instruments, Inc.
Thiokol Corporation
Thomas J. Lipton, Inc.
Time Incorporated
The Times Mirror Company
Timex Corporation
The Timken Company
The Trane Company
TRW Inc.
Union Carbide Corporation
United Brands Co.
United States Filter Corporation
United States Gypsum Co.
United States Steel Corporation
USM Corporation
Warner Communications, Inc.
Westinghouse Electric Corporation
West Point-Pepperell, Inc.
Wheelabrator-Frye Inc.
White Consolidated Industries, Inc.
Whittaker Corporation
W. R. Grace & Co.
Wyman-Gordon Company

ADDENDUM B

Constitutional and Statutory Provisions Involved

The Fourth Amendment to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

13 U.S.C. §9 (Census Act)

Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which

have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

5 U.S.C. §§551(4), 553 (Administrative Procedure Act)

§551(4)

For the purpose of this subchapter—

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . . .

§553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms of substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted

a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

15 U.S.C. §46(b) (Federal Trade Commission Act)

That the commission shall also have power—

• • •

(b) to require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the

commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

ADDENDUM C

Affidavit of Manuel D. Plotkin Sworn to November 1, 1977

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

In re FTC CORPORATE PATTERNS)
REPORT LITIGATION) No. A-370

County of Prince George's)
State of Maryland) ss

I, MANUEL D. PLOTKIN, being duly sworn, hereby depose and say as follows:

1. I am the Director of the Bureau of the Census, Department of Commerce. I have been the Director since I was confirmed by the Senate on May 13, 1977. I make this affidavit based upon personal knowledge and on information available to me in my official capacity.

2. The purpose of this affidavit is to present information as Director of the Bureau of the Census with respect to consideration by this Court of the stay of the District Court's July 15, 1977 enforcement order pending review by the Court of Appeals. The Bureau of the Census strongly favors continuation of the Court's stay of the District Court's order because of the adverse effect that denial of a stay could have on the integrity, completeness, and timeliness of national statistical programs, both voluntary and mandatory.

3. Even in mandatory programs, the accuracy and completeness of census data are dependent upon the goodwill and cooperation of respondents. The Census Bureau has developed a high degree of such cooperation because respondents are confident that information supplied the Census Bureau will be handled on a confidential basis and will be used solely for statistical purposes.

4. An example of a mandatory program that could be adversely affected by denial of a stay in this case is the Bureau of Census' five-year economic benchmark census. The Bureau is in the final stages of preparation of its major 5-year economic benchmark censuses. Within the next 60 days, report forms will be mailed to more than 2½ million establishments, including all establishments of the plaintiff companies, requesting information for the year 1977. Since the economic censuses use the "establishment" as a reporting entity, many of the requested data items are not readily available in the accounting records of multiestablishment companies. These data items involve unique statistical concepts, and I know of no accepted accounting standards which would require companies to maintain such records. Accordingly, respondents must make estimates of reported information, such as the value of interplant transfers at full economic value.

5. If a stay were denied and companies were requested to file such data with the FTC, many firms might

decline to submit information based on estimates (as they have in the past) for fear that such data would be used for other than statistical purposes. Rather, firms might restrict their reporting to data that can be substantiated from book records, an alternative that is legally permissible. The result would be the submission of less reliable and useful statistical data to the Census Bureau.

6. The impact could be even greater with respect to voluntary programs. The Bureau of the Census is dependent on the voluntary cooperation of American industry in the conduct of numerous surveys that provide important economic indicators. These surveys include the monthly Manufacturers' Shipments, Inventories, and Orders Survey, the weekly and monthly Retail Sales Surveys and numerous monthly and quarterly Current Industrial Reports. Enforcement of the District Court's order pending appeal could reduce the willingness of firms to cooperate with many of the Bureau of the Census' important statistical programs in which information is reported on a voluntary basis.

7. Denial of a stay would have the impact described above on the Census Bureau and various of its statistical programs. It would also affect users of Census data within the government. For example, it could affect the updating of numerous Federal statistical series, such as the Gross National Product accounts prepared by the Bureau of Economic Analysis, another agency of the Department of

Commerce, the Wholesale Price Index, prepared by the Bureau of Labor Statistics, and the Index of Industrial Production prepared by the Federal Reserve Board. In addition, the Census of Manufactures data are widely used by other government agencies such as the Council of Economic Advisers, the Departments of Energy and Treasury in analytical studies of specific industries, products, materials, or fuels consumed.

8. In short, my major concern is that denial of the stay at this crucial time would irreparably harm both the 1977 Economic Censuses and important voluntary economic surveys. This concern is similar to that expressed by former Census Director, Vincent P. Barabba, in an affidavit filed in District Court.* For these reasons, the Bureau of the Census strongly favors the issuance of a stay pending a decision on the merits by the Court of Appeals.

/s/ MANUEL D. PLOTKIN

MANUEL D. PLOTKIN

Subscribed and sworn to before me
this 1st day of November, 1977.

/s/ IRENE C. STEWART

Notary Public

My commission expires July 1, 1978.

* See Exhibit A to Applicants' Application for a Stay of An Order of the District Court for the District of Columbia.

Affidavit of Vincent P. Barabba
Sworn to July 13, 1976

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil No. 76-1117

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*,
Plaintiffs,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Defendants.

State of Maryland)
County of Prince George's) ss

I, VINCENT P. BARABBA, being duly sworn, hereby depose and say as follows:

1. I am the Director, Bureau of the Census, Department of Commerce. I have been the Director since I was confirmed by the Senate on August 13, 1973. I make this affidavit based upon personal knowledge and on information and belief available to me in my official capacity.

2. The purpose of this statement is to identify my position as Director of the Bureau of the Census with respect to the Federal Trade Commission's

Corporate Patterns Report. The Bureau strongly opposes this survey since in our judgment it may unnecessarily compromise the confidentiality of data furnished the Bureau pursuant to title 13, United States Code, by requesting similar information which the Federal Trade Commission (FTC) plans to publish in identifiable form. This duplication of reporting and possible publication not only increases the respondent burden but threatens to impact seriously on the many voluntary surveys conducted by Census.

3. The Census Bureau for many years has had a major statistical responsibility in the collection and publication of economic data. The Census of Manufactures is the major benchmark publication used by a number of Government agencies in validating their statistical programs. The information regarding product shipments and materials consumed by industry are important elements in the periodic updating of the input-output tables developed by the Bureau of Economic Analysis. These tables are then used to revise the estimates of Gross National Product. The Census data are also used in establishing benchmark levels for the Federal Reserve Board's Index of Industrial Production and in determining value added and value of shipments weights to be used in the regular monthly publication of that index.

4. The Census of Manufactures data, particularly the shipments and value added data, are also used by

the Bureau of Labor Statistics (BLS) in setting their Wholesale Price Index weights and in the development of special-purpose industry indexes. BLS also uses the census data for productivity and other special studies. The Bureau of Mines uses much of the materials consumed data as benchmarks for their more frequent monthly and annual surveys.

5. In addition to these regular uses for statistical purposes, the detailed Census of Manufactures data are widely used by other Government agencies such as the Council of Economic Advisers, Bureau of Domestic Commerce of the Department of Commerce, the Federal Energy Administration, and the Treasury Department in analytic studies of specific industries, products, materials, or fuels consumed. The Federal Trade Commission and the Justice Department use the measures of concentration (share of each industry and product class accounted for by the 4, 8, 20 and 50 largest companies) in connection with their investigations under the antitrust laws.

6. In recent years added emphasis has been given to the shipments of commodity data due to the increase in import and export activity and the need to measure the impact of foreign trade on domestic industry. The Trade Act of 1974, Public Law 93-618, 88 Stat. 1978 (See 19 U.S.C. 2101), seeks statistical comparability of domestic production with data for imports and exports.

Addendum C

7. The Census Bureau also publishes a wide range of other data from the quinquennial economic censuses program and from the large number of monthly, quarterly, and annual surveys conducted by the Bureau. These are also used by many Government agencies in evaluating current business conditions and in forecasting future trends.

8. In recognition of the importance placed on the statistical program at Census and in order to provide for the maximum safeguard of the information reported to it, the Congress has provided for the confidentiality of information submitted to Census in section 9 of title 13, U.S.C. In 1961 the Supreme Court ruled in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208 (1961) that under the census statute at that time, file copies of reports submitted to the Bureau of the Census were not immune from legal process and therefore their production could be compelled by the Federal Trade Commission. As a result of this decision, some respondents, fearing subpoena, destroyed the file copies of reports submitted to Census. Census therefore experienced difficulty in asking companies to check on the accuracy of their reports as well as a reluctance on the part of some respondents to report to the Census Bureau at all. Until corrective legislation was passed in 1962 (only 10 months subsequent to Supreme Court decision in *St. Regis*), to amend title 13 to provide immunity from subpoena of file copies, a real threat existed to the entire economic sector statistical program at Census.

Addendum C

9. I see a similar situation existing today in that the Federal Trade Commission's Corporate Patterns Report Program may adversely affect the Census Bureau's ability to collect and publish selected data. Companies may be unwilling to provide data to the Census Bureau on an estimated basis or may refuse to submit such estimates when they anticipate that the same information will be requested by a regulatory agency or that the data will be made publicly available. Information, if furnished at all, may therefore be subject to additional validation by a company prior to submittal which would seriously affect the timeliness essential to the prompt reporting of aggregate data. In order to reduce respondent burden as well as assure timeliness in response, we indicate to respondents that in the absence of book figures carefully prepared estimates are acceptable. This approach is acceptable since we are interested in compiling statistical estimates rather than totals with accounting accuracy. The more complex, diversified companies maintain different types of records at different levels of management control. Since the Census Bureau basically seeks information at the operating level (establishment data), many companies have to go to divisional or other records in order to obtain information that can be used to estimate the establishment data. This is particularly the case when shipments occur between plants of the same company for further processing. The fact that much of the data supplied Census has been maintained or estimated

solely to meet the Census request is important. It seems to me that the keeping of the national statistical system must be maintained clear and free from any purpose other than for which it was developed. When the supplier of the data views that he is being coerced into supplying the same information to a nonstatistical agency, that may operate against his interest financially, the data he submits, in my judgment, are likely to be hedged or distorted so as to diminish their value statistically.

10. An additional adverse impact on our statistical programs may result from the perception that this is a burdensome duplication of reporting caused by the Corporate Patterns Report. Similar information for value of shipments by product class was collected as part of the 1972 Census of Manufactures and is collected annually by the Bureau of the Census in its Annual Survey of Manufactures program. It is felt that this results in an unnecessary respondent burden. We are now finalizing our plans for the 1977 Census of Manufactures. The extent to which the Corporate Patterns Survey erodes the cooperative spirit of trust between Census and industry could seriously threaten this program.

11. The census statute (13 U.S.C.) prohibits the Bureau of the Census from making any publication whereby the data furnished by any particular establishment or individual can be identified. Although the FTC has indicated that it will not publish the data in identifiable form before January 1978, I feel that the Corporate Patterns Survey will be viewed by

companies as a method to obtain access to identifiable information collected by Census.

12. The Bureau of the Census is also dependent on the voluntary cooperation of American industry in the conduct of numerous surveys that provide important economic indicators. These surveys include the monthly Manufacturers' Shipments, Inventories, and Orders Survey, the weekly and monthly Retail Sales Surveys, and the numerous monthly and quarterly Current Industrial Reports. As a result of FTC's regulatory programs and the resulting reporting burden, I anticipate a loss of cooperation to many of our important statistical programs in which information is reported on a voluntary basis. This is borne out by our recent experience when we called 12 very large manufacturing companies that had discontinued reporting in the monthly manufactures survey mentioned above. More than half of the companies cited the Government's expanded mandatory reporting program as the reason for discontinuing their reporting in the Census survey.

13. I am particularly concerned about the specific reference to Census surveys and report forms in recent correspondence by FTC with the business community relating to the Corporate Patterns Survey and the resulting impact this association may have on the work of the Census Bureau. I find no basis for modifying the position Census has consistently taken with respect to the Corporate Patterns Re-

port; namely, that Census does not desire to have its statistical reporting relationship with industry, which is confidential under law, referred to in any way in the CPR program by FTC. Both on the basis of law and on the written and verbal commitments made by the Bureau, industry has accepted the proposition that the Bureau of the Census will use the information industry provides for statistical purposes only and not for purposes of investigation, regulation, or taxation. I feel very strongly that these relationships should not be disturbed in any manner by the activities of the Federal Trade Commission.

14. Although the Bureau of the Census cannot furnish FTC individual company data, we could provide aggregate information from Census publications by means of special tabulations provided on a reimbursable basis. The kinds of special tabulations that could be developed for FTC are not limited to value of shipments and merger and acquisition data for the largest 1,200 companies every 5 years. The Bureau's many economic surveys provide an extensive current data base which has a high degree of reliability. For example, the Bureau's Annual Survey of Manufactures can provide concentration tabulations similar to those published at 5-year intervals as part of the Census of Manufactures. The Bureau's technical staff is frequently called on to develop analytical ratios of industrial activity and for calculation of regressions or cross-tabulations of selected data on a reimbursable basis. In fact,

all that is necessary is for the FTC to specify its requirements for aggregate data, and a cost and time estimate will be provided.

Subject to the limitations mentioned above, Census would make every effort to maximize the amount of data to be made available.

/s/ VINCENT P. BARABBA

VINCENT P. BARABBA

Subscribed and sworn to before me this 13 day of July, 1976

/s/ IRENE C. STEWART

Notary Public
My commission expires 7-1-78

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